

FREQUENTLY ASKED QUESTIONS CREDIT-SALE CONTRACT INDEMNITY FUND

**Compiled by the
North Dakota Public Service Commission**

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Q 1: What is the credit-sale contract indemnity fund?

A: This fund was created by the 2003 Legislature to provide partial protection for unpaid credit-sale contracts in grain elevator or grain buyer insolvencies. Money will come from a 0.2% (.002) assessment on all credit-sale contracts, to be deposited in a fund administered by the Public Service Commission. Collections will continue until the fund reaches \$10 million (estimated 7 years). Assessments will then cease unless and until claims reduce the fund to \$5 million, assessments would then resume to rebuild the fund.

Q 2: How much coverage does the indemnity fund provide to a seller?

A: Each patron's coverage is limited to 80% of their unpaid credit-sale contracts with the insolvent buyer, up to a maximum payout of \$280,000. For example: \$50,000 in contracts = \$40,000 payout; \$150,000 in contracts = \$120,000 payout; \$350,000 or more in contracts = maximum \$280,000 payout. Assessments are to be collected on all credit-sale contracts, even if a farmer has more than \$350,000 in outstanding contracts.

Q 3: What is a credit-sale contract?

A: North Dakota Century Code 60-02-01(2) defines a credit-sale contract as “. . . a written contract for the sale of grain pursuant to which the sales price is to be paid or may be paid more than 30 days after the delivery or release of the grain for sale. . . Where a part of the sale price of a contract for the sale of grain is to be paid or may be paid more than 30 days after the delivery or release of the grain for sale, only such part of the contract is a credit-sale contract.”

Q 4: What are common kinds of credit-sale contracts?

A: Common forms of credit-sale contracts include: deferred payments, delayed pricing, NPE, installment sales, or variations of these contracts by another name. These agreements are not, however, always credit-sales - the key is 30 days. For example, a deferred payment contract written on December 3 for January 2 payment is not a credit-sale contract and would have no assessment taken against it because payment is made within 30 days. Conversely, a deferred payment contract written on December 3 for payment on January 5 is a credit-sale, since payment is more than 30 days after the release date.

Q 5: What if a farmer enters into a contract on December 3rd that provides for payment on January 5th, but the farmer later requests and receives payment on January 2nd? Is this a credit-sale?

A: Opinions differ, but the PSC believes that the answer is “no.” The original contract was a credit-sale because payment was to be made after 30 days. However, that contract was amended when both parties agreed to payment in 30 days or less. Because payment was made in 30 days or less, it is not a credit-sale and no assessment is payable.

Q 6: What about delayed pricing contracts in which the farmer might pick a price any time within the next six or nine months?

A: Again, 30 days is the key. Any money that is paid out in 30 days or less is not a credit-sale and is not subject to the fund’s assessment. Payments that are made more than 30 days after title passes are credit-sale transactions and are subject to the assessment.

Q 7: What if the contract is signed on December 5th and it provides for a “window” of payment options (e.g. “Payment will be made between January 1 – 15.”)? Is this a credit-sale?

A: It depends on when the payment is actually made. If the licensee pays for the grain in 30 days or less, the transaction is not a credit-sale and no assessment should be collected. If payment is made after more than 30 days, the transaction is a credit-sale and indemnity fund assessments are payable.

Q 8: Do I collect the assessment if I give an advance on a contract?

A: If the contract provides for an advance within the first 30 days, the portion advanced is not a credit-sale and would not be subject to the assessment. If there is a delayed advance of more than 30 days from the execution of the contract, then that portion is a credit-sale and is subject to the assessment. Any payments made more than 30 days after the contract is executed are credit-sales that are subject to assessment.

Q 9: When will assessments begin?

A: Assessments begin on August 2, 2003. Contracts executed prior to August 2, 2003, are not to be assessed and are not eligible for protection from the Indemnity Fund if the buyer becomes insolvent. Contracts may not be re-executed after August 1st in order to create protection.

Q 10: On what amount is the assessment to be taken?

A: On the value of the grain, after quality discounts are taken, but before any fees are subtracted.

Q 11: Whose contracts are assessed?

A: All credit-sale contracts should be assessed, regardless of whether the seller is a farmer or another elevator or a grain buyer. Any credit-sale grain purchased by a grain elevator, a grain buyer, or a processor that is licensed by the PSC is subject to assessment.

Q 12: How will this program be administered?

A: The Public Service Commission will provide licensees with a short remittance form that must be returned within 30 days after the end of each calendar quarter along with the appropriate remittance.

Documentation of the assessment collected must be maintained by the licensee for review by PSC inspectors.

Q 13: Do I need to submit a report if I didn't make any payments on credit-sale contracts during the quarter?

A: Yes. If a licensee doesn't submit a report, the Commission has no way of knowing if there were no credit-sale payments during the quarter or if the licensee simply forgot to send in the report. Requiring a report from each licensee every quarter will allow the Commission to monitor compliance.

Q 14: Do I need to fill out a separate report for each of my firm's elevator locations?

A: No. Licensees with multiple locations can combine their records and submit just one report and one remittance check. Company records must, however, be compiled to reflect how the remittance was calculated and which contracts were involved.

Q 15: Do I need to participate in this program if I am a roving grain buyer or a federally licensed warehouse with a state grain buyers license?

A: Yes. Participation in this program is mandatory. For federally licensed facilities, collections for this patron funded program is not prohibited by the United States Warehouse Act.

Q 16: Must I change my contract forms to comply with this new law?

A: No. The law requires that assessment amounts must be noted on each contract - it can simply be written on the document. The PSC is advising major grain trade printers that they may want to add a blank for this on future printings.

Q 17: If a seller prices out a delayed pricing contract and puts the proceeds on a deferred payment contract, do I collect two assessments?

A: No. Assessments are calculated only when actual payments are made. If one contract is rolled over into another and no payments are made at the time of the rollover, no assessment is due. That will happen when payments are made under the new contract.

Q 18: How about minimum price and basis-fixed or basis-open contracts?

A: Keep in mind the 30 days and the purpose of the contract. If the contract is a grain purchase contract with a minimum price feature, but for later delivery, it is not a credit-sale because there has been no sale. If the grain has been delivered and put on a delayed pricing contract with one of these features, and if payment is made more than 30 days later, the agreement is the credit-sale contract and the assessment should be taken when payment is made.

Q 19: Is participation in this program voluntary?

A: No. All licensees and farmers must participate. Farmers may not "opt-out" and apply for refunds.

Q 20: My elevator has purchased bond coverage to protect deferred payment contracts. It appears that we may now have double coverage. What should we do?

A: That is a decision for each elevator to make but indemnity fund assessments must be collected and remitted even if credit-sale bond coverage is in place. In many instances, credit-sale bond coverage may protect only deferred payment and installment sales contracts, not delayed pricing contracts. If there is dual coverage, it is not known which coverage would step in first in an insolvency. The PSC might assert that the bond should pay if coverage is available; the indemnity fund should only step in to pay shortfalls. A bond company might take the opposite position. Ultimately, it might be up to a court to decide.

Q 21: What if I'm escrowing deferred payment contract dollars for the benefit of sellers?

A: The assessment is still required. There is nothing in the indemnity fund law to prevent escrowing. That is up to the parties involved in the contract.

Q 22: What if a farmer can't or won't decide what to do with his grain, or wants to sell his grain on some form of credit-sale contract but then doesn't sign the contract in a timely manner?

A: State law requires that scale tickets, including those compiled on an assembly sheet, must be converted into cash, noncredit-sale contracts, credit-sale contracts, or warehouse receipts within 30 days after the grain is delivered to the warehouse (60-02-11). To be valid, a credit-sale contract must be signed; an unsigned credit-sale contract is not valid and is, in effect, an open scale ticket. Elevators should notify farmers concerning their policy regarding the handling of grain when a farmer fails to give specific instructions or fails to sign a verbally agreed-to contract. Elevators can go "cash only" or "delayed pricing only" instead of accepting grain for storage on warehouse receipts. This is commonly done by posting a sign and/or writing disposition instructions on the scale ticket. However, farmers must be notified, in advance, concerning the elevator's policy and discrimination is not permissible.

Q 23: What if the warehouseman makes a mistake and overpays the PSC? Can he get a refund?

A: The PSC expects to adopt rules to cover this occurrence. It is expected that refunds will be permitted, but only if the amount involved is significant and if the refund is requested in a timely manner (like within 60 days). Refunds would go to the buyer; the buyer would be responsible for repaying individual farmers.

Q 24: What does the state intend to do to prevent unscrupulous claims against the fund?

A: Indemnity Fund payments constitute a debt obligation of the person who caused the payment to be made. The Legislature has given the Commission the authority to take legal action against any person / licensee who causes payments to be made out of the fund.

Q 25: What if I have other questions?

A: Call the Public Service Commission at 701-328-4097.